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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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OCT 22 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
)
SCRIPPS HOWARD)
BROADCASTING COMPANY)
)
For Renewal of License of)
Station WMAR-TV,)
Baltimore, Maryland)
)
and)
)
FOUR JACKS BROADCASTING,)
INC.)
)
For Construction Permit for)
a New Television Facility)
on Channel 2 at Baltimore,)
Maryland)

MM Docket No. 93-94

File No. BRCT-910603KK

File No. BPCT-910903KE

To: The Honorable Richard L. Sippel
Administrative Law Judge

**REQUEST FOR PERMISSION TO FILE AN APPEAL
OF THE ORDER DENYING THE REQUEST FOR
ISSUANCE OF SUBPOENA DUCES TECUM**

Four Jacks Broadcasting, Inc. ("Four Jacks"), pursuant to Section 1.301(b) of the Commission's rules, respectfully requests permission to appeal the denial of its Request for Issuance of Subpoena Duces Tecum (the "Request"). In the Request, delivered to the Presiding Judge on October 20, 1993, Four Jacks sought to obtain certain documents relevant to Scripps Howard Broadcasting Company's ("Scripps") claim to a renewal expectancy in the above-captioned proceeding. In an order released October 22, 1993, the Presiding Judge denied the Request. Four Jacks contends that an appeal is necessary for the following reasons:

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1. The Presiding Judge misapprehended the nature of the document request. The request does not seek documents "that would tend to show the methodology used by NBC" in regard to determining issue-responsive programming. Instead, Four Jacks seeks documents in the possession of NBC that relate to the request(s) made by WMAR-TV personnel to NBC personnel for NBC program release schedules and synopses. Ms. Emily Barr, Acting General Manager at WMAR-TV, testified at her deposition that she had, during the summer and fall of 1992, both telephoned NBC personnel and sent by facsimile to NBC personnel, requests for lists of NBC programs that were responsive to WMAR-TV's viewer concerns during a portion of 1991. In short, Four Jacks is not concerned with the manner in which NBC determined issue-responsive programming.^{1/} Rather, the documents sought by Four Jacks pertain to the manner in which WMAR-TV tied NBC programming to Baltimore community issues. This issue is directly relevant, particularly because it appears that WMAR-TV attempted to tie NBC programming to local issues roughly a year after the fact.

2. Four Jacks does not request a broad search by NBC for documents that "may not exist yet," as the Presiding Judge feared. The documents requested should have been in Scripps' files. In fact, Four Jacks has been told about many documents

^{1/} The Judge's Order notes that at the Admissions Session "counsel for Scripps Howard offered to make available by speakerphone an NBC archivist to explain NBC records, how they are maintained in the course of business, and how they were transmitted to Scripps Howard for use in preparing a summary exhibit." Order, n. 1 (citing Tr. 113-14). This proffer, however, is irrelevant to Four Jacks' subpoena request, as Four Jacks is not concerned with the authenticity of NBC records.

relevant to this proceeding that should have been in Scripps' files but were either missing or destroyed.^{2/} In this situation, however, there is a remedy because NBC should have a copy of the relevant documents.

3. The documents presently sought by Four Jacks came into existence, according to Ms. Barr's deposition testimony, in the summer and fall of 1992. One such document apparently listed topics for which WMAR-TV requested responsive NBC programs. The Request focused narrowly on communications which Ms. Barr testified occurred between NBC and Scripps during a period of several months in 1992 in regard to a particular topic.

4. No disruption or delay will be created by the grant of permission to appeal. Four Jacks intends to serve the Subpoena promptly upon signature, and the documents are to be produced within 10 days of service. Even assuming several days' delay for any responsive motions under the Commission's rules, production of the documents would still likely occur prior to the close of the hearing or a relatively short period of time thereafter. In addition, Four Jacks anticipates using any recovered documents as rebuttal evidence. The Presiding Judge has not yet set a schedule for presenting rebuttal evidence, thereby eliminating the risk of delay at that stage in the proceeding. Moreover, because the documents are business records it is unlikely that there will be need for cross-examination in regard to the documents. Little prejudice to either party would thus result

^{2/} This issue came up at the Admissions Session during the discussion of Attachment E to Ms. Barr's direct case exhibit.

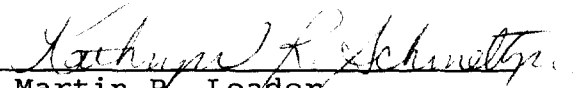
even if the documents were produced in the middle of the scheduled hearing, or if the Presiding Judge reopened the hearing once the documents became available.

5. Four Jacks contends that were the hearing to proceed in the absence of the material and relevant requested documents, the case would likely be remanded to the Presiding Judge to reopen the record to consider the documents. Accordingly, the Judge's ruling "is such that error would be likely to require remand should the appeal be deferred and raised as an exception." See 47 C.F.R. Section 1.301(b).

Respectfully submitted,

FOUR JACKS BROADCASTING, INC.

By:


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Dated: October 22, 1993

CERTIFICATE OF SERVICE

I, Valerie Mack, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, hereby certify that on this 22nd day of October, 1993, I have caused to be served a copy of the foregoing "REQUEST FOR PERMISSION TO FILE AN APPEAL OF THE ORDER DENYING THE REQUEST FOR SUBPOENA DUCES TECUM" by hand upon the following:

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